APPENDIX A

Opinions Below

Civil No. 438

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF MONTANA
BILLINGS DIVISION

LAURENCE COLBRESE, JR.,
Plaintiff

vs.

NATIONAL FARMERS UNION PROPERTY
AND CASUALTY COMPANY,
Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on regularly before the court, sitting without a jury, on March 18, 1965, the court having theretofore submitted a special interrogatory for the decision of a jury on December 21, 1964; and the respective parties having both adduced evidence in support of their respective claims and defenses hereunder, and each having submitted requested findings of fact and conclusions of law and memoranda in support thereof, and the court being fully advised in the premises, does hereby make and find the following:

FINDINGS OF FACT

I.

Defendant is a capital stock corporation, organized under the laws of the State of Utah, with its principal offices and place of business in Denver, Colorado, duly authorized to transact the business of insurance in the State of Montana at all times mentioned herein. Plaintiff is a citizen of the State of Montana. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

II.

Duaine Colbrese, deceased, was 16 years of age at the time of his death on December 3, 1960. Plaintiff is the father of Duaine Colbrese, deceased.

III.

On December 3, 1960, at about 8:00 o'clock A.M., Duaine Colbrese was riding as a passenger in a 1949 Ford two-door sedan, motor and serial No. 69672, driven by Jerry Kinney, minor son of Albert Kinney, upon and along U.S. Highway #10, a public highway running generally in an east-west direction across the State of Montana. At a point approximately one mile east of the town of Reed Point, Montana, Jerry Kinney operated, managed and controlled the automobile in such a manner that it skidded on ice, left the highway, upset and thereby caused injuries to the person of Duaine Colbrese which resulted in his death.

IV.

The 1949 Ford automobile was acquired by Albert Kinney when he purchased a farm and the machinery and equipment thereon from a Mrs. Robert McCormick prior to September 2, 1958. The record owner of the farm and the Ford was C. W. Ehart, who died prior to September 2, 1958, leaving as his sole heir, Robert McCormick. Upon Ehart's death, McCormick became entitled to all of Ehart's right, title and interest in the Ford. McCormick died, leaving as his sole heir, Mrs. Robert McCormick, who thereupon became entitled to McCormick's right, title, and interest in the Ford.

V.

Prior to September 2, 1958, Mrs. McCormick agreed to sell all of her right, title and interest in the Ford to Albert Kinney for a consideration, which has been fully paid. Since September 2, 1958, Kinney has been in possession of the Ford and has claimed to be its owner.

Albert Kinney received the "certificate of registration and tax receipt" from Mrs. McCormick and paid for Montana licenses for the automobile for the years 1959 and 1960.

The "certificate of ownership" issued by the Registrar of Motor Vehicles of the State of Montana covering the Ford has not been delivered to Kinney by Mrs. McCormick, or anyone representing her, or by the Regis-

trar of Motor Vehicles. On four or five occasions between September 2, 1958, and December 3, 1960, Kinney requested the attorney for Mrs. McCormick and the Ehart estate to furnish to him the title certificate (certificate of ownership) issued by the Registrar of Motor Vehicles relating to the Ford.

VI.

On or prior to December 3, 1960, Albert Kinney was the owner of a certain 1951 Dodge automobile, having motor and serial No. 02755. On September 7, 1960, Albert Kinney obtained from the defendant a policy of insurance, bearing Policy No. A24-107,394, which provided $50,000/100,000 bodily injury liability coverage, $5,000 property damage coverage, and $2,000 medical payments coverage.

VII.

On and prior to December 3, 1960, Albert Kinney was also the owner of a certain 1954 International 1½ ton truck motor vehicle, having motor and serial No. 20950. Upon written application from Albert Kinney, executed April 14, 1954, defendant made, issued and delivered to Albert Kinney a policy of insurance bearing No. A24-030,461, which provided $25,000/50,000 bodily injury liability coverage, $5,000 property damage coverage, and $1,000 medical payments coverage.

VIII.

On May 26, 1961, the plaintiff, Laurence Colbrese, Jr., filed an action in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, as Cause No. 38051, in which Laurence Colbrese, Jr., was plaintiff, and Jerry Kinney was named as defendant. In the complaint the plaintiff, as the father of Duaine Colbrese, prayed for judgment and damages in the total sum of $40,850,00, including as special damages, the sum of $850.00 as casket, funeral and cemetery expenses.

IX.

Subsequently, Albert Kinney, as father of Jerry Kinney, made written demand upon defendant, National Farmers Union Property & Casualty Company, that it appear and defend said action on behalf of Jerry Kinney. The defendant declined to accept the defense of the action, or to admit coverage under any of its policies theretofore issued to Albert Kinney.

X.

Subsequently a change of venue was granted in Cause No. 38051, and the action was transferred to the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Stillwater, as Cause No. 3650. In that court, Jerry Kinney, by and through his duly appointed Guardian ad litem, Albert Kinney, filed his written offer to allow judgment to be taken against him in the sum of $18,850.00. Thereafter,

Laurence Colbrese, Jr., filed his written acceptance of the offer and, on October 16, 1962, judgment against Jerry Kinney was entered in the sum of $18,850.00, with costs in the sum of $12.88, making a total judgment of $18,-862.00. Although the judgment does not recite that any investigation or inquiry was made by the judge to determine if entry thereof was for the best interests of the minor defendant, there is also nothing in the proof submitted in this action which would establish that no such investigation or inquiry was undertaken. Jerry Kinney was legally obligated to pay the amount of that judgment to the plaintiff in this action, Laurence Colbrese, Jr.

XI.

After the entry of judgment, Jerry Kinney, through his counsel, made written demand upon defendant, National Farmers Union Property & Casualty Company, for payment of the judgment and attorney's fees incurred in the amount of $750.00. The defendant company again declined to accept liability under any of its policies of insurance.

XII.

On June 7, 1963, Albert Kinney was appointed by the District Court of the Thirteenth Judicial District, in and for the County of Yellowstone, as guardian of Jerry Kinney, and Letters of Guardianship were issued to Al-

bert Kinney on June 7, 1963, under file No. 13145 of that court. On June 7, 1963, Albert Kinney petitioned the aforesaid court for an order authorizing him to execute for his ward an assignment of Jerry Kinney's right to sue for and collect indemnity from National Farmers Union Property & Casualty Company in the amount of the judgment entered against him in Civil Action #3650, Stillwater County, Montana, plus attorneys' fees amounting to $750.00, in consideration of the satisfaction of the judgment. On June 7, 1963, an order was entered by the district judge of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, in file No. 13145, authorizing Albert Kinney, guardian of Jerry Kinney, to execute an assignment of all rights to sue for and collect indemnity from defendant herein, in consideration of the satisfaction of the judgment entered against Jerry Kinney, in Civil Action #3650, Stillwater County, Montana. An assignment was executed in pursuance to the order on June 12, 1963, and on the 20th day of June, 1963, an acknowledgment of satisfaction of the judgment was filed in the office of the Clerk of Court of Stillwater County, Montana, and satisfaction of judgment entered.

XIII.

Each of the above mentioned insurance policies required the defendant to pay on behalf of the insured all sums which the insured should become legally obligated to pay as damages because of:

"A. Bodily injury, sickness or disease, including death resulting therefrom, hereinafter called bodily injury, sustained by any person * * *

Arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile * * *, and the company shall defend any suit alleging such bodily injury or property damage * * *."

Other policy provisions which are pertinent are as follows:

"The following are insureds under (liability):

(a) With respect to the owned automobile,

(1) The named insured and any resident of the same household.

(2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured;

(b) With respect to a non-owned automobile,

(1) the named insured,

(2) any relative, but only with respect to a private passenger automobile or trailer not regularly furnished for the use of such relative; * * *

"'Non-owned automobile' means an automobile or trailer not owned by the named insured or any relative, other than a temporary substitute automobile;"

XIV.

The 1949 Ford was not "regularly furnished" for the use of Jerry Kinney.

XV.

On September 2, 1958, upon the written application of Albert Kinney, the defendant issued its policy of in-

surance numbered A24-157-138 covering the 1949 Ford, with Albert Kinney as the named insured, providing bodily injury liability of $10,000/20,000 coverage, $5,000 property damage liability coverage, and $500.00 medical payment coverage arising out of the use, operation and maintenance of the 1949 Ford. Albert Kinney paid the defendant the insurance premiums due upon this policy of insurance for the years 1958 and 1959, but he allowed the policy to lapse for non-payment of premium on September 2, 1960. The said policy was lapsed and not in effect on the date of death of the minor, Duaine Colbrese, on December 3, 1960.

XVI.

Defendant's form application for insurance on the 1949 Ford contains a paragraph #7 as follows:

> "With the exception of any encumbrance stated, the named insured is the sole owner of the vehicle unless otherwise stated herein:"

Nothing is written in the blank following such paragraph. However, defendant's agent, Dwight Harris, filled out the application form himself, and was informed, before the application was signed by Albert Kinney, that no ownership certificate (title) had been received by Albert Kinney from the attorney for C. W. Ehart's estate. Dwight Harris at no time pertinent to this case, inquired of Albert Kinney as to whether Kinney had any non-owned vehicles in his possession or use, and at no time pertinent to this case did Albert Kinney rep-

resent to defendant that he was the sole owner of the 1949 Ford.

WHEREFORE, in consideration of the foregoing findings of fact and the court being advised in the premises, hereby makes and adopts the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction of this cause by reason of the diversity of citizenship of the parties and because the amount in controversy exceeds $10,000.00, exclusive of interest and costs.

2. The 1949 Ford automobile in which plaintiff's son was killed was, on December 3, 1960, a "non-owned automobile" under defendant's insurance policies referred to in Paragraphs VI and VII of the findings of fact, and was not regularly furnished for the use of Jerry Kinney by his relative, Albert Kinney.

3. Jerry Kinney was entitled to representation and defense of the lawsuit and claim made against him by Laurence Colbrese, Jr., in the state court action, and by refusing to do so defend and represent Jerry Kinney, defendant breached the insurance contracts mentioned in Paragraphs VI and VII of the findings of fact.

4. The judgment entered by compromise in the state court action was not void and is not subject to collateral attack by defendant. Pursuant to said judgment, Jerry Kinney was legally obligated to pay plaintiff herein the amount of $18,862.88, plus interest from the date of entry thereof, to-wit: October 16, 1962.

5. By virtue of defendant's breach of its insurance contract with its insured, Jerry Kinney, Kinney was entitled to claim the amount of the judgment, as aforesaid, plus interest thereon, from defendant, which said claim was assigned and is now owned by the plaintiff Laurence Colbrese, Jr.

6. Neither Albert Kinney, Jerry Kinney nor plaintiff are estopped from claiming as against defendant, or from asserting, that the 1949 Ford was a non-owned automobile under defendant's policies, nor have any of them waived their rights to do so.

7. Plaintiff is entitled to recover from defendant the $850.00 item of special damages representing casket, funeral and cemetery expenses even though plaintiff has sought to recover these same damages under the "Medical Payments" provisions of the aforementioned insurance policies in a separate state court action against defendant.

8. That plaintiff is entitled to judgment in the amount of $18,862.88, plus interest from October 16, 1962.

DISCUSSION

Following a pretrial conference on January 10, 1964, the defendant filed a motion for summary judgment on the ground that under the undisputed facts and as a matter of law, the 1949 Ford automobile was not

a "non-owned automobile" within the meaning of the policies issued by the defendant, but rather was a vehicle owned by Albert Kinney, the named insured. The motion for summary judgment was denied in a memorandum opinion filed April 1, 1964, and reported at 227 F. Supp. 978. Relying upon the interpretation of Section 53-109(d) R.C.M. 1947,[1] by the Supreme Court of Montana in Safeco Insurance Co. v. Northwestern Mutual Ins. Co., 1963, 142 Mont. 155, 382 P.2d 174, it was held that the title of the Ford automobile had not passed to Albert Kinney and that the Ford was a non-owned automobile within the meaning of the policies issued by the defendant.

Thereafter, on December 21, 1964, the issue of whether the Ford automobile was "regularly furnished for the use of Jerry Kinney, prior to and including December 3, 1960" was tried before a jury, sitting in an advisory capacity. The jury found that the vehicle was not regularly furnished for the use of Jerry Kinney. The evidence amply supported this finding, and it is adopted by the court.

Defendant's brief in support of its motion for summary judgment sets forth that the purpose of the motion was to test the applicability of section 53-109(d)

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1 Subsection (d) provides:

"(d) Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose."

under the facts of this case. In its memorandum in support of its proposed findings of fact and conclusions of law, defendant takes the position that section 53-109(d) does not and cannot apply if the person named in the certificate is deceased, and that the transfer was in effect one by operation of law, which is governed by section 53-109(e).

Section 53-109(e) prescribes the procedure to be followed by an executor, administrator, and others acting in a representative capacity, and their successors in interest, "(i)n the event of a transfer by operation of law of any title or interest of an owner of the legal title or owner in and to a motor vehicle registered under the provisions of this act, as upon inheritance, devise or bequest * * *" [2]

It is apparent that subsection (e) applies only to

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2 Subsection (e) provides in pertinent part:

"(e) In the event of a transfer by operation of law of any title * * * in and to a motor vehicle registered under the provision of this act, as upon inheritance, devise or bequest, * * * the executor, administrator, * * * or successor in interest of the person whose title or interest is so transferred shall forward to the registrar of motor vehicles an application for registration in the form required for an original application for registration, together with a verified or certified statement of the transfer of such title or interest which statement shall set forth the reason for such involuntary transfer, the title or interest so transferred, the name or names of the person or persons to whom such title is to be transferred, the process of procedure effecting such transfer and such other information as may be requested by the registrar and with such statement shall be furnished such evidence and instruments as may otherwise be required by law to effect a transfer of legal or equitable title to or an interest in chattels as may be required in such cases, and in the event the registrar shall be satisfied that such transfer is regular and that all formalities as required by law have been complied with, he shall cause to be sent to the owner, conditional sales vendors, lessors, mortgagees and other lienors, as shown by his records notice of such intended transfer and thereafter, but not less than five (5) days thereafter, shall register such motor vehicle and shall issue a new certificate of ownership and certificate of registration to the person or persons entitled thereto * * *."

transfers "by operation of law." The statement of transfer must set forth, inter alia, the reason for the "involuntary transfer." Kinney did not acquire his interest in the Ford automobile by reason of any transfer by operation of law, but through a *voluntary* transfer from Mrs. McCormick. Obviously, the administrator of the estate and Mrs. McCormick should have taken proper steps under subsection (e) to obtain a certificate of ownership. The transfer from Mrs. McCormick to Kinney, however, was a voluntary transfer governed by subsections (a), (b) and (d) of section 53-109.

Defendant next contends that even though Albert Kinney was not the record owner of the Ford automobile, he and plaintiff have either waived or are estopped from asserting the right to deny Kinney's ownership of the car. This defense is premised upon the contention that by making the written application for insurance on the Ford and continuing the policy in effect for two years Albert Kinney induced and led the defendant to believe he was the owner. This defense fails for several reasons.

First, none of the testimony indicates that Albert Kinney ever contended that he had received a certificate of title for the Ford. In fact, in the findings of fact, supra, it was noted that the defendant's agent who filled out the application was clearly apprised that Kinney did not have the title.[3] This knowledge of the defendant's

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3 The agent testified in pertinent part:

"Q. Mr. Harris, you knew at the time you filled out this application that the title to the 1949 Ford was not registered in the name of Albert Kinney, did you not?

A. Yes, I did. Albert told me that.

Q. And you were never informed at any time that it was registered in his name, were you?

A. No."

agent under Montana law applicable at all times pertinent to this case was imputed to the defendant and it was bound thereby.[4] In Curtis v. Zurich General Accident & Liability Insurance Co., 1939, 108 Mont. 275, 280; 89 P.2d 1038, the Montana court, quoting from an earlier Montana case, Webber v. Mass. Bonding & Ins. Co., 1928, 81 Mont. 351, 359, 263 Pac. 101, 104, stated the rule on this point:

> "It is well settled that, where the agent of an insurance company, who fills out the application for insurance, is duly informed as to facts and fails to state them in the application, the actual knowledge of the agent will be held to be the knowledge of the company."

See also Fireman's Ins. Co. of Newark, N.J., v. Show, D. Mont. 1953, 110 F.Supp. 523, 527.

The imputation of Harris's knowledge of the status of the title to the defendant likewise prevents the defendant from asserting the defense of estoppel. Estoppel is defined in the Montana Codes as follows:

> "3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it. (R.C.M. 1947, section 93-1301-6)."

This code section has been construed as a statutory declaration of the doctrine of equitable estoppel. Hustad

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4. In 1959 the Montana Legislative Assembly enacted a comprehensive Insurance Code (R.C.M. 1947, sections 40-2601 to 40-5359) and repealed many of the formerly applicable laws. However, this new Code did not become effective until January 1, 1961, and its provisions are not material to the determination of this case. See R.C.M. 1947, Section 40-2615, and Laws of Montana 1959, Ch. 286, §19.

v. Reed, 1958, 133 Mont. 211, 222; 321 P.2d 1083 and cases there cited. The Hustad case, at 133 Mont. 223, outlined the elements necessary to an equitable estoppel, the first of which is: "1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts." In the instant case there was no representation or concealment of material facts since the fact claimed to have been concealed, the status of the title to the Ford, was known to the defendant through its agent.

Nor may the defendant rely upon a "waiver" of plaintiff's right to deny that Kinney owned the car. In Northwestern Fire & Marine Insurance Co. v. Pollard, 1925, 74 Mont. 142, 148, 238 Pac. 594, the court described a waiver in this language:

> "Waiver is the voluntary abandonment or surrender by a capable person, of a right known to him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefits. . . .
>
> "Waiver must be manifested in some unequivocal manner and . . . it must in all cases be intentional. . . . An intention to make the waiver claimed should clearly be made to appear by the evidence. . . ."

In this case not only is it not "clearly made to appear from the evidence" that Kinney intended to waive the right to assert his non-ownership of the Ford, but also there is a complete lack of any evidence that Kinney committed any act or acts which directly or indirectly constituted such a waiver. At no time did he ever maintain

that the title to the Ford was other than the evidence has shown it to have been, that is, that the record title was not in Kinney but rather was tied up in the estates of E. C. Ehart and Robert McCormick.

As a third defense, the defendant alleges that Albert Kinney, at the time the policies on the Dodge automobile and International truck were issued, represented to defendant that all vehicles owned by him or used by him were insured by the defendant, and that its underwriting rules would have prevented it from issuing the policies if in fact Albert Kinney had not owned the Ford or if he had a non-owned automobile in his possession available for his use and that of his family without being covered for insurance by the defendant.

There is no proof of the alleged representations. As noted supra, the evidence established that Kinney did not represent to the defendant's agent that he was the record owner of the Ford. The record is void of any evidence that Kinney ever represented to the defendant that all motor vehicles owned or used by him were insured by the defendant. Moreover, as shown by the findings of fact, supra, the defendant's agent was not required by the defendant to secure information from applicants for insurance as to whether they had use of or possession of or were using non-owned vehicles, and that he had never made such an inquiry. The lack of any proof of the representations or misrepresentations claimed by the defendant precludes the defendant from

setting up the defense of estoppel or from claiming the policies were ineffective because of misrepresentation.

The defendant has not proven that its underwriting rules would have prevented the issuance of the policies, but even if it had proven them it would have been estopped from pleading a breach of the policies based on Kinney's possession and use of the non-owned Ford. The Montana Supreme Court in the Curtis v. Zurich General Accident & Liability Ins. Co., supra, stated the rule applicable to this situation:

> "The general rule is that when the insurer at the time of the issuance of the policy had knowledge of existing facts which, if insisted on, would invalidate the contract from its very inception, such knowledge constitutes a waiver of the conditions in the policy inconsistent with the known facts, and the insurer is estopped from asserting the breach of such conditions." (108 Mont. 282, quoting from Midland Motor Co. v. Norwich Union Fire Ins. Co., 72 Mont. 583.)

See also Judge Pray's opinion in Fireman's Insurance Co. of Newark, N.J. v. Show, supra. And, since the defendant, under the rule of the Webber case, is charged with notice of facts known to its agent, it issued the policies with full knowledge and cannot now deny liability on that basis.

* * *

(The Court then discusses one phase of proceeds covered by the policy not involved in any consideration of the controlling legal issue involved here. We shall not include such unnecessary discussion in this appendix.)

* * *

CONCLUSION

* * *

The defendant had an opportunity to defend the state court action, but declined to do so. Even though the defendant acted in good faith in refusing to defend the state court action, this was in fact a breach of its contracts under the holding of the Montana court in Safeco Insurance Company v. Northwestern Mutual Ins. Co., supra, which was discussed in some detail in the memorandum opinion denying defendant's motion for summary judgment. As suggested in that opinion, the defendant could properly have instituted an action in state court in an effort to obtain a declaratory judgment of the Supreme Court of Montana modifying the Safeco rule as applied to the facts in this case. It did not do so. I am still of the opinion that in the absence of any further construction of the Montana statutes by the Montana Supreme Court, Safeco is controlling.

The plaintiff will prepare, serve and lodge judgment pursuant to the provisions of Rule 11(b) of the Local Rules of Court.

Done and dated this 20th day of August, 1965.

W. J. JAMESON
United States District Judge

Filed August 20, 1965.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20550

NATIONAL FARMERS UNION PROPERTY AND CASUALTY COMPANY,
Appellant

vs.

LAURENCE COLBRESE, JR.,
Appellee

(November 7, 1966)

Appeal from the United States District Court for the District of Montana
Billings Division

Before BARNES, JERTBERG, and ELY, Circuit Judges.

ELY, Circuit Judge:

The appellant, defendant below, appeals from the District Court's denial of its motion for summary judgment and the entry of judgment in favor of appellee. The District Court's jurisdiction was based upon diversity of citizenship of the parties and the requisite amount in controversy, 28 U.S.C. §1332, and our power of review is conferred by 28 U.S.C. §1291.

On December 3, 1960, the appellee's son was killed in an automobile accident, and appellee instituted suit for

alleged wrongful death in a Montana state court. In that suit, the defendant was Jerry Kinney, a minor who was operating the automobile in which the deceased was riding as a passenger at the time of the fatal accident. The appellant, which had issued automobile indemnity insurance policies to Jerry Kinney's father, denied obligation and refused to furnish assistance in defense of the state court action. The parties agreed that the state court should enter a judgment for $18,850 in appellee's favor. Appellee then gave Jerry Kinney a satisfaction of the judgment in exchange for an assignment in which Jerry Kinney transferred his rights against appellant to the appellee. This action followed.

Jerry Kinney was not the "named insured" in any policy issued by the insurance company, nor was the car he was driving at the time of the fatal accident, a 1949 Ford, described in any of the company's insurance policies then in force. His alleged right to indemnity rests upon a clause appearing in each of two policies issued to Albert Kinney, Jerry's father. These policies provided coverage for periods which included the date of the accident and were identical except for the designation of the vehicle described as the "owned automobile" in each of the two policies. Each policy described one of two motor vehicles which were owned by Albert Kinney, neither of which, as has been said, was the particular automobile which was involved in the accident.

The policies were each entitled, "Family Automo-

bile Policy," and each contained provisions defining those covered as "insureds." The provisions read:

"(a) With respect to the owned automobile,

(1) the named insured and any resident of the same household,

(2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured;

(b) *With respect to a non-owned automobile,*

(1) *the named insured,*

(2) *any relative, but only with respect to a private passenger automobile or trailer not regularly furnished for the use of such relative;*

(c) Any other person or organization legally responsible for the use of:

(1) an automobile or trailer not owned or hired by such person or organization, or

(2) a temporary substitute automobile, provided the actual use thereof is by a person who is an insured under (a) or (b) above with respect to such automobile or trailer." (Emphasis supplied.)

The appellee contends that Jerry Kinney was insured under the provision, italicized above, as a "relative" of Albert Kinney, "the named insured," operating a "non-owned . . . private passenger automobile . . . not regularly furnished for the use of such relative."

A disputed fact question was resolved by the jury, which in its answer to a special interrogatory, found that the 1949 Ford was "not regularly furnished for the use of" Jerry Kinney.

The determinative issue on this appeal is whether or not, at the time of the accident, the Ford was, with respect to the named insured, Albert Kinney, a "non-owned automobile." The district judge determined, as a matter of law, that it was.

At some time before February 25, 1957, one Ehart had owned the Ford, and a Montana certificate of title had been issued to him. Ehart died on the last mentioned date, leaving Robert McCormick as his sole heir. McCormick died later in 1957, leaving all his property to his wife. Mrs. McCormick then, in 1957[1] agreed to sell the Ford to Albert Kinney. She was paid the whole agreed consideration by Kinney, and she delivered to Kinney the keys and the Montana registration certificate. Kinney was, with the registration certificate, enabled to purchase a Montana license for the car in his own name. No certificate of ownership was executed or transferred to him. Since the purchase in 1957, both Mrs. McCormick and Albert Kinney have regarded the automobile as being the property of Kinney. He repaired it and restored it to operating condition in 1958. He maintained possession of it and purchased insurance to cover its operation. He insured it with the defendant company as the "owned automobile" under "family" policies from September 2, 1958, to September 2, 1960. The car then ceased to function properly, and the insurance was not

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1 While the finding of the district judge is that the sale took place "on or prior to September 2, 1958," the parties agree in their briefs to this court that it occurred during the year 1957.

renewed. Despite numerous requests by Kinney to the attorney handling the Ehart estate, no certificate of title had been furnished to him or obtained by him. As a result, the only outstanding certificate of title to the Ford at the time of the accident was that which had been issued to Ehart in June, 1951.

The relevant provisions of the Montana statute relating to sale and transfer of automobiles are as follows:

> "(a) Upon a transfer of any title or interest of an owner or owner in or to a motor vehicle registered under the provisions of this act as hereinbefore required, the person or persons whose title or interest is to be transferred shall write their signatures with pen and ink upon the certificate of ownership issued for such vehicle, in the appropriate space provided upon the reverse side of such certificate, and such signature shall be acknowledged before a notary public.
>
> (b) Within ten (10) days thereafter, the transferee shall forward both the certificate of ownership so endorsed and the certificate of registration, together with the information required under section 53-107, to the registrar, who shall file the same upon receipt thereof and no certificate of ownership and certificate of registration shall be issued by the registrar of motor vehicles until the outstanding certificates are surrendered to that office or their loss established to his reasonable satisfaction.
>
> (d) *Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose.*

(e) In the event of a transfer by operation of law of any title or interest of an owner of the legal title or owner in and to a motor vehicle registered under the provisions of this act, as upon inheritance, devise or bequest, order in bankruptcy or insolvency, execution sale, repossession upon default in the performance of the terms of a lease or executory sales contract, or otherwise than by voluntary act of the person whose title or interest is so transferred, the executor, administrator, receiver, trustee, sheriff or other representative or successor in interest of the person whose title or interest is so transferred shall forward to the registrar of motor vehicles an application for registration in the form required for an original application for registration, together with a verified or certified statement of the transfer of such title or interest which statement shall set forth the reason for such involuntary transfer, the title or interest so transferred, the name or names of the person or persons to whom such title or interest is to be transferred, the process of procedure effecting such transfer and such other information as may be requested by the registrar and with such statement shall be furnished such evidence and instruments as may otherwise be required by law to effect a transfer of legal or equitable title to or an interest in chattels as may be required in such cases, and in the event the registrar shall be satisfied that such transfer is regular and that all formalities as required by law have been complied with, he shall cause to be sent to the owner, conditional sales vendors, lessors, mortgagees and other lienors, as shown by his records notice of such intended transfer and thereafter, but not less than five (5) days thereafter, shall register such motor vehicle and shall issue a new certificate of ownership and certificate of registration to the person or persons entitled thereto. The notice herein required shall be deemed complied with by deposit in the post office in Deer Lodge, Montana, such notice, postage prepaid, addressed to such person or persons at the respective addresses shown on his records." Section 53-109, R.C.M. 1947. (Emphasis supplied.)

The district judge determined, under section 53-109(d), italicized above, that the attempted transfer of ownership from Mrs. McCormick to Albert Kinney was a nullity. He concluded that he was compelled by the decisfon of the Supreme Court of Montana in *Safeco Insurance Co. v. Northwestern Mutual Ins. Co.*, 142 Mont. 155, 382 P.2d 174 (1963), to hold that the Ford was, in its relation to Albert Kinney, a "non-owned automobile," because no certificate of title in Kinney's name had ever been issued.

Appellant must admit, and it does, that there was no compliance with section 53-109(a) and (b), if such was required, and appellee concedes that section 53-109(d) applies, by its own terms, only to transactions which are required to be formalized pursuant to the procedures "hereinbefore" prescribed, that is, prescribed by section 53-109(a), (b) and (c). The dispute, then, concerns the applicability of subsection (d). Appellant contends that the course of events by which the ownership of the car passed from Ehart through the McCormicks to Albert Kinney—in practical effect, at least, if not in legal contemplation—falls entirely within section 53-109(e) and that subsection (d) is therefore inapplicable. We disagree.

Whether the Montana registrar of motor vehicles would require successive transfers of title, first from Ehart to Robert McCormick, then from Robert McCor-

mick to Mrs. McCormick, and, finally, from Mrs. McCormick to Albert Kinney, or whether, upon being made aware of the circumstances, he would issue only one certificate of title, and that in the name of Albert Kinney, without the intermediate steps having been taken, is of no moment. The fact is that, since the instant before the death of Ehart, there have been three transfers or attempted transfers of the ownership of the automobile. In none of these were the requirements of section 53-109 satisfied. For reasons deemed by it to be sufficient, the Montana Legislature has declared that the prescribed procedure for the voluntary transfer of title to automobiles shall be mandatory. If appellant's construction of the statute were correct, then at any time when a transfer by operation of law occurred, the successive owners of the automobile involved could thereafter ignore the legislative mandate with impunity. It cannot be that the Legislature intended that its mandate might be so easily avoided, nor do we feel constrained by the language of the statute to so hold. The first two transfers were undoubtedly by operation of law, governed by section 53-109(e), but the third, from Mrs. McCormick to Albert Kinney, was not. It was a voluntary transfer and, as such, was required to be made pursuant to subsections (a) and (b). Since it was not so made, section 53-109(d) declares that "said intended transfer shall be incomplete and not be valid or effective for any purpose."

We do not believe, however, that our foregoing conclusion is dispositive. As we read section 53-109(e), its only effect is that legal title to an automobile cannot pass to a voluntary transferee in the absence of compliance with the statutory procedure. Since there was no such compliance here, legal title did not, "for any purpose," pass to Albert Kinney. The crucial question is not the identity of the holder of the legal title but whether or not the car was "non-owned" by Kinney as the term is employed in the insurance contract.

In *Matsuo Yoshida v. Liberty Mutual Insurance Co.*, 240 F.2d 824 (9th Cir. 1957), and in *Teixeira v. Globe Indemnity Company*, 349 F.2d 502 (9th Cir. 1965), our court recognized that even if a statute purports to define ownership of an automobile, the provision does not necessarily fix the meaning of the phrase "owned automobile" as the phrase is employed in an insurance policy; rather, it is the meaning intended by the parties which controls.

In *Teixeira, supra,* the insured's stepson was involved in an accident while driving a car which had been left with the family some five months earlier by a friend who left to work on board a ship. It was intended by the friend that the members of the family would use the car during his absence, but there was never any agreement to purchase the car, nor were any payments to him ever made. As the court interpreted the policy,

which contained provisions similar to those contained in the policies before us, the insurer would be liable only if the car was an "owned automobile" of the insured. We affirmed the judgment of the District Court, being "aware of no decision of a reviewing court which has extended the usual and ordinary meaning of the definition of the word 'owned automobile' which appear in the insurance policy in the instant case to include such a tenuous relationship as existed between Mrs. Teixeira and the Corvair automobile." 349 F.2d at 505.

Liability of the insurer in *Yoshida, supra,* was dependent upon a finding, as is the liability of the appellant herein, that the automobile was "non-owned." Gonzales, the insured, was a conditional sale contract vendee, and legal title remained in the vendor at the time of the accident. It was held that Gonzales was nevertheless the owner of the car and that his insurer was not liable. An applicable California statute defined "owner" to include the purchaser under a conditional sale agreement, but we noted,

> "Of course, the statutory definition is not necessarily controlling for the words of a contract are to be taken in their ordinary and popular sense. . . . We believe, however, that common understanding of the words 'owner' and 'own' with respect to automotive vehicles accords with our view. Under law the conditional vendee has the beneficial interest in the automobile, including the right of possession. *It is his to drive and use. He lacks only the bare legal title.* . . . If the clause has any common or popular meaning, it means that a person in Gonzales' position is the owner of the car. Indeed, Gonzales so

understood, for in the accident report filed after the first accident he inserted his own name in the blank marked 'owner'." 240 F.2d at 827. (Emphasis added.)

Appellee argues that, despite the fact that this court might be disposed to allow the controversy to turn on the meaning of the concept of ownership as it was employed by the parties to the insurance contracts in question, we are bound by the decision in *Safeco Insurance Co. v. Northwestern Mutual Ins. Co., supra,* to affirm. If *Safeco* had decided the very question involved in the instant case, we would, of course, be constrained to follow. *Shuttlesworth v. Birmingham,* 382 U.S. 87, 91, 15 L. Ed. 2d 176, 86 Sup. Ct. 211 (1965). We do not, however, interpret that decision as laying down a hard and fast rule to the effect that an automobile may not under any circumstances be an automobile owned by the insured within the meaning of an insurance policy unless the insured is the holder of the certificate of ownership.

The instant case is distinguishable from *Safeco* in several material respects.[2] The accident resulting in *Safeco* occurred only *one day* after Harlan Dean, the insured driver, agreed to purchase the car from a dealer, at a time when a substantial portion of the agreed consideration remained unpaid. No papers of any kind

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2 The District Court recognized this, writing, "Admittedly the factual situation here is distinguishable [from Safeco] in many respects." The District Court also recognized that "It is possible . . . that as applied to a different factual situation the Supreme Court of Montana would modify its interpretation of §53-109(d)."

were executed or handed over to Dean. There were no records of the sale, not even entries on the dealer's books. Emphasizing the extremely tenuous nature of the agreement, the opinion notes that Dean, after recovering from injuries suffered in the accident, reclaimed his "trade-in" vehicle from the dealer, "and the matter was at an end." In our case, on the other hand, Kinney had paid the entire agreed price, and he had enjoyed undisputed dominion and control over the Ford for a period of nearly three years prior to his son's accident. Moreover, while in *Safeco* neither the dealer nor Dean had made any attempt to comply with the Montana registration or transfer statutes, Kinney had obtained the certificate of registration from Mrs. McCormick. He had bought state licenses and insurance for the car, and he had attempted in an informal way to obtain a certificate of title. The claimed transfer in *Safeco* was even more uncertain than that which our court, in *Teixeira,* characterized as "tenuous." Of Kinney and the 1949 Ford we can say, as we did in *Yoshida, supra,* "It is his to drive and use. He lacks only the bare legal title."

The dealer's insurer in *Safeco* was held to be primarily liable, as against Dean's insurer, under a "garage owners liability policy." Such a policy is designed to provide protection in special situations to persons who, by their occupation, are in regular and frequent contact with a number of motor vehicles, the identity of which

is subject to constant change. An insurer issuing such a policy to an automobile dealer must surely contemplate that its protection extends to the use of cars by prospective purchasers. On the facts of *Safeco*, we believe that Dean could have been characterized as being no more than that.

On the other hand, what were the expectations of the parties to the insurance contracts involved in this litigation? The insurer knows that an insured may be the owner of two or more automobiles. For what reason, then, was coverage under a "family automobile policy" extended to a relative's use of non-owned *automobiles*, more than one, not regularly furnished for his use, but only to his use of *the* owned *automobile*, the *one* owned automobile described in the policy? The obvious reason is the frequency with which the owned and described automobile is used or may be used by members of the household. In consideration of an actuarially determined price, or premium, the insurer agrees to indemnify the family members against some of the liabilities to which their driving of motor vehicles might subject them. The more "owned" automobiles or "regularly furnished" non-owned automobiles to which a family has access, the more likely it is that liability will be incurred. Condition 4 of the policy[3] indicates that more than one automobile may be insured, but that would be

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3 "When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each . . . ."

done, we must assume, only in consideration of a higher premium.

A fundamental principle of insurance law is that a policy is to be construed liberally in favor of the insured and strictly against the insurer, who normally is responsible for the language it contains. As was said in *Holmstrom v. Mutual Benefit Health & Accident Ass'n*, 139 Mont. 426, 364 P.2d 1065 (1961),

> "The policy holder must be protected against conflicting, confusing and ambiguous statements in policies and whenever there are two constructions that can be placed upon a policy this court believes the better rule is to apply that construction most favorable to the policy holder." 364 P.2d at 1067-68.

That sentiment does not prevent application of the more general principle that an insurance policy, like any other contract, must be given an interpretation which is reasonable and which is consonant with the manifest object and intent of the parties.[4] It is manifest here that there was no doubt in the mind of Albert Kinney that he was the owner of the Ford. His recognition of his owner-

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4 In the interpretation of questionable provisions of an insurance contract, it is the reasonable expectation of the insured which controls. "Although courts have long followed the basic precept that they would look to the words of the contract to find the meaning which the parties expected from them, they have also applied the doctrine of the adhesion contract to insurance policies, holding that in view of the disparate bargaining status of the parties we must ascertain that meaning of the contract which the insured would reasonably expect."

Gray v. Zurich Insurance Company, ... Cal. 2d.....', ..., ... Cal. Rptr. ....., ... P.2d ..... (Oct. 25, 1966) (Footnotes omitted).

See also Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 637 (1943); Patterson, The Interpretation and Construction of Contracts, 64 Colum. L. Rev. 833, 858 (1964). Cf. 3 Corbin, Contracts §545 at 164 (1960).

ship is clearly evidenced by facts already mentioned, including the fact that for two years of the period of his dominion, he had paid additional premiums as consideration for a separate policy to insure the particular car.

Since 1957, when Mrs. McCormick agreed to sell the Ford to Albert Kinney and surrendered possession to him when she received the agreed price, no person questioned or attempted to disturb Kinney's claim of ownership. Even in this lawsuit there is no contention that the car belongs to someone other than Albert Kinney. The assertion is simply that it is "non-owned" by him. He had, for almost three years before the accident, exercised complete dominion and control over the vehicle. He possessed it, and he repaired it. He held, and presumably still holds, the certificate of registration. He secured state licenses for the car, and for two years he drove it and insured it in a separate policy agreement with the appellant company. Now it is he himself, in effect, through his minor son's assignee, who asserts that the vehicle was "non-owned" by him. If section 53-109(d) did not exist, no reasonable person could question the fact that Kinney was, in every true sense of the word, the owner of the car. If he owned the vehicle, it was not a "non-owned" vehicle within the meaning of the insurance contract. The Montana statute requires us to do no more than to admit that "legal title" did not pass to him.

To hold that Albert Kinney was not the owner of the Ford within the meaning of the policies in suit would do violence to the intention of the parties, to traditional legal concepts of ownership, and to our own sense of right and wrong. There is no Montana authority which, on its facts, compels us to apply the technical statutory requirements for transfer so as to torture the terms of a contract. Absent such compulsion, we will not require appellant to underwrite a risk which it did not sell and for which it was not paid. Upon remand, the action will be dismissed.

Reversed.

Office of the Clerk
U. S. COURT OF APPEALS
P. O. Box 547
San Francisco 1, Calif.

Nov. 7, 1966

Crowley, Kilbourne, Haughey, Hanson & Gallagher
Elec. Bldg.
Billings, Montana

Dear Sir:

In case No. 20550 NATL FARMERS UNION V COLBRESE, JR an opinion..... was this day filed, in accordance with which a Judgment or Decree was filed and entered Reversing, etc., judgment of Decree of the Court below.

Pursuant to Rule 26, and unless the mandate is stayed by the order of the Court, or unless a petition for a rehearing of the cause be filed meantime, and as provided by Rule 23, a mandate of this Court will be due to issue on the expiration of 30 days from date hereof.

Time for certiorari petition, Civil cases: 90 days Criminal cases: 30 days.

Sincerely,

Wm. B. LUCK
Clerk

Office of the Clerk
U. S. COURT OF APPEALS
P. O. Box 547
San Francisco, California 94101

Dec. 8, 1966

Messrs. Wiggenhorn, Hutton, Schiltz & Sheehy
Attorneys at Law
Electric Bldg.
Billings, Montana

Dear Sir:

The Petition for a Rehearing..... heretofore filed in case No. 20550 — NATIONAL FARMERS UNION PROPERTY & CASUALTY CO. v. LAURENCE COLBRESE, JR. was this day denied.

Pursuant to Rule 26, and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of five (5) days from the date hereof.

Time for certiorari petition: Civil cases, 90 days; Criminal cases, 30 days.

Sincerely,

FRANK H. SCHMID,
Clerk.

APPENDIX B

I. Excerpts from Brief of Appellant Safeco Submitted on Appeal to Montana Supreme Court.

(Appell. Br. p. 1)

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No. 10432

IN THE

SUPREME COURT

OF THE

STATE OF MONTANA

SAFECO INSURANCE COMPANY OF AMERICA, A Corporation, and HARLAN DEAN,

Plaintiffs and Appellants,

vs.

NORTHWESTERN MUTUAL INSURANCE COMPANY, A Corporation, and BEAR PAW SALES & SERVICE, INC., A Corporation,

Defendants and Respondents.

APPELLANTS' BRIEF

STATEMENT OF THE CASE

* * *

(Appell. Br. pp. 6-7)

We think it will be agreed that the issue here is quite narrow: If Dean was the "owner" of the Studebaker on May 11th the Safeco policy is responsible; if Bear Paw was the "owner" then the Northwestern policy is responsible up to its limits, beyond which Safeco becomes responsible as the "excess" insurer.

On the mixed question of law and fact the trial court made the only finding of fact which is disputed (VII, R. p. 40) to the effect that Bear Paw "sold" the

Studebaker to Dean on May 10th and that on the 10th, Dean delivered possession of the Hillman to Bear Paw and Bear Paw delivered possession of the Studebaker to Dean.

* * *

As a part of the same finding the Court further found, "That it was then and there the intention of the parties that Harlan Dean should become the owner of the Studebaker automobile and that at all times subsequent to the 10th day of May, 1960, Harlan Dean possessed said automobile and drove it as the owner thereof." (R. p. 41).

The Court then made four Conclusions of Law which may be summarized as follows:

1. There was a completed sale under the general law of sales and at the time of the accident Dean was the owner not driving by permission from Bear Paw but as a matter of right as owner.

2. The Studebaker was not owned by Bear Paw as the word "owner" is used in the Northwestern policy.

3. Dean was owner of the Studebaker as the word "owner" is used in the Safeco policy and the Studebaker was a replacement automobile under the policy.

4. The Northwestern policy does not protect Dean and the Safeco policy does. (R. p. 42-43)

Decree accordingly was entered in favor of the defendants. (R. p. 43)

* * *

(Appell. Br. pp. 13, 30)

ARGUMENT

I. *Motor Vehicles Can Be Transferred or Ownership Acquired Only By Certificate of Title In Compliance with Section 53-109, R.C.M. of 1947.*

* * *

We have found no authority under statutes anywhere near comparable to Section 53-109 where any change of ownership or interest was upheld absent delivery of the properly endorsed and acknowledged certificate of title. The Court here simply ignored Section 53-109 in favor of some "general law of sales." Therein lies, we think, the fundamental error in this case.

* * *

(Appell. Br. pp. 34-35)

III. *The Effect of "Ownership" On The Insurance Coverage.*

A. THE INSURANCE POLICIES

There is no dispute as to the provisions of the respective insurance policies or the court's findings of fact thereon. Nor do we anticipate dispute on the following propositions:

(1) If, as a result of the dealings between the parties Dean became the owner of the Studebaker and Bear Paw ceased to be the owner, on the 10th of May, then the Safeco policy covers the accident on the 11th, because the Studebaker was a replacement automobile. This follows from the terms of the Safeco policy in which the Hillman car was described, reading:

"PERSONS INSURED: The following are insureds under the Liability Section.

(a) With respect to the owned automobile.

(1) the named insured and any resident of the same household."

"'OWNED AUTOMOBILE' means the described private passenger or utility automobile, *any replacement automobile,* any additional automobile, or any trailer owned by the named insured; it also includes a temporary substitute automobile;

"'REPLACEMENT AUTOMOBILE' means any private passenger or utility automobile *of which the named insured acquires ownership;* provided it replaces the owned automobile and notice of its delivery be given 'SAFECO' within the policy period then current or within 30 days, whichever is greater."

(R. p. 34)

(2) If, as a result of the dealings between the parties Bear Paw continued to be the owner of the Studebaker and was the owner on the 11th, then Northwestern is liable on its policy under the following terms thereof.

"(b) *Owned Automobile and Non-Owned Automobile.* The term 'owned automobile' means an automobile or trailer owned in full or in part by or registered in the name of the named insured; and the term 'non-owned automobile' shall mean any other automobile."

(R. p. 37)

"III. DEFINITION OF INSURED: The unqualified word 'insured' includes not only the named insured, but also (1) . . . (2) any person while using an owned automobile or a hired automobile, and any person or organization legally responsible for the use thereof, provided the actual use is by the named insured or with his permission."

(R. p. 38)

This latter clause has been designated in the decisions as the "omnibus clause" and will be so referred to in this brief.

* * *

II. Excerpts from Brief of Respondent Northwestern Mutual Submitted on Appeal to Montana Supreme Court.

No. 10432

IN

SUPREME COURT

THE

STATE OF MONTANA

SAFECO INSURANCE COMPANY OF AMERICA, a Corporation, and HARLAN DEAN,

Plaintiffs and Appellants,

vs.

NORTHWESTERN MUTUAL INSURANCE COMPANY, a Corporation, and BEAR PAW SALES & SERVICE, INC., a Corporation,

Defendants and Respondents.

RESPONDENT'S BRIEF

From the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Hill

APPEARANCES:

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I.

STATEMENT OF THE CASE

A. *SUMMARY*

Bear Paw Sales & Service, Inc., called Bear Paw, sold a Studebaker car to Dean and delivered possession of it to Dean on May 10, 1960, Bear Paw took in trade a Hillman car. On May 11th Dean had an accident with the Studebaker injuring one Smith. At the time of the accident, the certificate of title to the car stood in the name of Luebben, Pear Paw's predecessor in interest, but was held by Bear Paw. The certificate of title was not delivered to Dean nor was it endorsed to show his ownership.

At the time of the accident Dean owned a liability insurance policy issued by Safeco, and Bear Paw owned a liability insurance policy issued by Northwestern. If Dean was the "owner" of the car on May 11th, the Safeco policy is responsible. If Bear Paw was the "owner" on May 11th, Northwestern is responsible.

The sole problem in the case is one of definition. What does the word "owner" mean as used in two policies?

B. *STATUTORY LAW*

Section 53-133, subd. f, R.C.M. 1947, reading:

"The term 'owner' shall include any person, firm, association or corporation owning or renting a motor vehicle, or *having the exclusive use thereof,* under *lease or otherwise,* and shall also include a *contract vendee.*"

Section 53-419, subd. 10, R.C.M. 1947, reading:

" 'Owner.' A person who holds the legal title of a motor vehicle, or in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof, with the right of purchase upon performance of the conditions stated in the agreement, and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purposes of this act."

Section 53-109, R.C.M. 1947, reading: (Quoting the the statutes).

(Resp. Br. pp. 1-6)

* * *

II.

ARGUMENT

A. *THE PROBLEM*

The problem here is one of definition. What does the word "owner" mean as used in the insurance policies written by the respective companies? An insurance policy is a contract. (Sec. 2, Ch. 286, L. 1959.) Contracts of insurance are to be interpreted as other contracts, and must be interpreted to give effect to the mutual inten-

tion of the parties. (Sec. 13-702, R.C.M. 1947; Stevens v. Steck, 101 Mont. 569, at 576, 55 Pac. 2d 7.)

Respondents contend that Section 53-109(d) R.C.M. 1947, is a recording statute governing the record title as distinguished from ownership; that Section 53-133, R.C.M. 1947, defines ownership.

Respondents recognize the rule that the law in existence at the time of the formation of a contract may be read into it. (Appellants' Brief, p. 35-36.) Such rule is of no real assistance here because the problem is, which law do we read in? The major effort of this brief is to indicate that Section 53-133 R.C.M. 1947, which defines "owner" should be read into the contract, and that Section 53-109(d), which does not so much as use the word "owner," should not.

B. *THE MEANING OF THE WORD 'OWNER."*

(1) *The intention of the parties and practical consideration.*

(a) * * * Dean, on the other hand, was interested in protecting himself from liability. He was probably not concerned with the technical requirements of title nearly as much as the real facts of his ownership and liability which might follow it. He might be surprised indeed to find that an automobile which he owned in the normal sense of the word was not covered by his insurance contract because of some unexpected meaning given his policy by the Montana registration laws. Normally we would expect that the parties would intend a cut-off date gov-

erning the insurance company liability to be the date upon which the right to control the vehicle involved changed. The word "owner" therefore would, if interpreted in accordance with what the parties intended be construed to include persons who, because of basic property rights, had a right of control and to exclude those who did not.

(b) The force of this argument is illustrated by the other words used in the policy. Before there can be liability here under the Northwestern policy, we must not only contort the word "owner," but must contort the word "permission" as well, since Northwestern is liable only if the car was owned by Bear Paw and driven by Dean with Bear Paw's permission. The fact is that Dean drove the car as a matter of right under a claim of ownership.

* * *

Giving the word "owner" a normal meaning, Dean has the insurance he bargained for and is not dependent for his protection on the happenstance of his vendor's coverage.

(c) As a practical matter the law gains nothing by the application of the unrealistic language of Section 53-109d to the interpretation of the word "owner" as it appears in the policies under consideration.

(Resp. Br., pp. 13-17)

* * *

(2) Dean was the Owner under the General Law of Sales.

Under the law of sales, uncomplicated by the statutes pertaining to automobile registration, Harlan Dean was the owner of the Studebaker on the 11th of May, 1960. At that time the car was identified, the possession was delivered, the price was agreed upon, part payment had been made by delivery of Dean's Hillman to Bear Paw, and there was an agreement that the balance due could be paid in any way that Dean wanted it.

Section 67-1703, R.C.M. 1947, provides:

> "The title to personal property, sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not."

Certainly the conditions of this section were met. The passing of title once the thing to be sold is identified is largely a matter of intent.

* * *

In this case all parties are agreed that it was intended that Dean was the owner of the Studebaker.

(Resp. Br. p. 18)

* * *

4. *The registration law (Section 53-109d) should not control the definition of ownership.*

It is Respondents' position that the insurance policies involved should not be defined on the basis of Section 53-109d, because:

(a) Such a result is unrealistic,

(b) Is not compelled by the statutes,

(c) Is not compelled by the case authority.

(a) *A literal application of 53-109d is unrealistic.*

We deal here with a registration law which uses broad language but which does not indicate any intention to alter either the basic law of torts or contracts. Professor Hudson, in an article on the Motor Vehicle Certificates of Title Act, 3 Drake L. Rev. 21-22, commented on such laws as follows:

> "It should be recognized, however, that whenever a statute is drafted in such inclusive and comprehensive language that purports to change generally accepted rules on the disposition of property, consequences will be felt in many areas perhaps not anticipated by the legislature."

We deal here with one of the "unanticipated consequences" and the problem is whether the court should so interpret the law as to create more unanticipated consequences than are necessary. Since interpretation is required, and it is because if Section 53-109d is held to control the word "owner," it will conflict with both 53-133f and 53-419, subd. 10, the court has some freedom. That freedom should be exercised to produce results grounded in some reality rather than in technical and artificial results.

* * *

It should be remembered here that if 53-109d is held to govern ownership, that it will govern it whole hog and that there is no place short of the actual issuance of the registration certificate at which the court can say

that ownership has changed. Since the results which would follow such a holding are so utterly absurb and will result in such manifest injustices the court should not so hold unless compelled by the statute to do so. There is no such statutory compulsion.

(Resp. Br. pp. 24-25, 27)

* * *

5. *Section 53-133(f), R.C.M. 1947, should control the meaning of the word "owner."*

Respondents contend that since Section 53-133(f) does define the word "owner," in connection with motor vehicles, it should govern the meaning of the word "owner," when that word is used in an automobile insurance contract. As late as 1947, 53-133(f) was amended. At that time the registration laws (53-109) were on the books in their present form. If there is a conflict between 53-109d and 53-133f, then, since 53-133 is later in time, it should apply. Likewise, since 53-133 deals with the word "owner" and 53-109d does not, there is further reason why the former should control.

* * *

Section 53-133f clearly contemplates that all persons having exclusive use, under some form of a contractual right are owners. Thus, renters, lessees, owners and contract vendees are specified. It makes no sense to classify a renter under an oral renting arrangement as an owner and to exclude from the definition a person who under an enforceable oral contract of sale has be-

come entitled to all rights of title and possession.

Appellants seek to avoid the effect of 53-133f by designating it as a registration and licensing statute. The vice in that argument is that if 53-133f is a licensing law, so equally is 53-109d. If licensing laws are to be read into contracts, and that is what Appellants seek to do with 53-109d, then all licensing laws must be read in, and if there is a conflict the most appropriate should be the one chosen.

The language used in the Montana Owners' Responsibility Law is persuasive here.

(Resp. Br., pp. 28-29)

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6. *The Case Authority*

(a) *Montana Cases*

* * *

(b) *Foreign Cases*

The value of the case authority from foreign jurisdictions is dubious since nowhere do we find the exact statutory pattern which exists in Montana. Support for either position may be found in some of the language in the cases if statutory distinctions are ignored.

(1) *California*

The California registration law is the same as the Montana registration law. The California cases are complicated by the fact that California has a Responsibility Law which places a vicarious liabilty upon owners in the absence of the notification required by the responsi-

bility statutes. For about two decades the California Courts have struggled with the problems which the Montana Court here faces. After some indecision the California Courts have held that "ownership" does change despite the registration law and that the omnibus clause of a vendor's insurance policy is not liable where there has been a failure to comply with the registration law. Because of this long struggle and because the California courts have reached results which do not ignore the realities, we believe the California cases to be persuasive.

* * *

Ownership as distinguishable from title in California is not controlled by the registration law.

(Resp. Br., pp. 31, 32-33)

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(Between pages 33 and 45 Respondent cites, quotes, and discusses the following California cases:)

Henry v. General Forming, Limited, (Cal.), 200 P.2d 785 (Br. p. 33);

Willard H. George v. Barnett (Cal. App.), 150 P.2d. 591 (Br. p. 34);

Goodman v. Angelo-California Trust Co. (Cal. App.), 217 Pac. 1078 (Br. p. 34);

Sly v. American Indemnity Company of Galveston (Cal. App.), 15 P.2d 522 (Br. pp. 35, 37, 38);

Swing v. Lingo (Cal. App.), 19 P.2d 56 (Br. p. 35);

Piacun v. Hexem (Cal. App.), 63 P.2d 315 (Br. p. 36);

Votaw v. Farmers Automobile Inter-Insurance Exchange (Cal.), 85 P.2d 872, 97 P.2d 958 (Br. pp. 37, 39);

Harbor Insurance Co. v. Paulson (Cal. App.), 286 P.2d 870 (Br. pp. 38, 41);

Venne v. Standard Accident Ins. Co. (Cal. App.), 340 P.2d 30 (Br. pp. 38, 43);

Bunch v. Kin (Cal. App.), 37 P.2d 744 (Br. p. 39).

* * *

(Following the case discussion the Respondent's Brief concluded.)

Clearly in California the counterpart of Section 53-109d does not govern the meaning of the word "owner"; does not in a case such as this make the omnibus clause effective.

(2) *Other Jurisdictions*

As previously indicated cases reaching differing results on differing statutes may be found in the foreign jurisdictions. There are cases holding that statutes similar to or even more restrictive than the Montana Statute do not govern the meaning of the word "owner" and do not make the omnibus clause liable in situations such as the one at bar.

(Resp. Br., pp. 45-46)

* * *

CONCLUSION

It is submitted that Judge Elwell reached the correct result in this case. We are after all concerned with the definition of the word "owner." If that word is given the meaning in law that it bears in the minds of people, then sensible results may be reached. But if we attach to the word artificial meanings because of a statute which does not use the word "owner," then many consequences will follow which neither the parties nor the legislature intended. When we twist words so that they do not mean what the people who use them think they mean, harsh and unjust results are bound to follow.

(Resp. Br., pp. 51-52)